Supreme Court, U.S.
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No. 99-1706

IN THE

Supreme Court of the United States

RICHARD A. SULLIVAN,

Petitioner,

v.

RIVER VALLEY SCHOOL DISTRICT, a Michigan Public School District; CHARLES O. WILLIAMS, Superintendent, individually and in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether Petitioner has Identified any Compelling Reasons Which Would Justify This Court's Exercise of its Discretion to Grant a Writ of Certiorari?

II. Whether the Sixth Circuit Court of Appeals Correctly Applied Controlling Law to the Undisputed Facts of this Case When it Affirmed the District Court's Dismissal of Petitioner's Age Discrimination and Retaliation Claims on Summary Judgment?

LIST OF PARTIES

Petitioner Richard Sullivan, an individual, is an employee of the River Valley School District. He is currently on leave for reasons unrelated to this case.

Respondent River Valley School District is a public school district located in Three Oaks, Michigan and is a governmental agency. Respondent Charles O. Williams was, at all times material hereto, Superintendent of River Valley School District.

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OPINIONS AND ORDERS BELOW

On November 29, 1999, the United States Court of Appeals for the Sixth Circuit issued its Opinion on the merits of this case. (Petitioner's Appendix (hereinafter "Pet. App.") pp. 1a-15a; see also 197 F.3d 804). Judgment pursuant to this Opinion was entered on that same date. (Pet. App. pp. 16a-17a). On January 25, 2000, the Sixth Circuit denied Petitioner's Petition for Rehearing En Banc. (Pet. App. pp. 34a-35a).

On September 8, 1998, the United States District Court for the Western District of Michigan (Honorable Robert Holmes Bell) issued an Opinion analyzing why summary judgment in Respondents' favor was appropriate. (Pet. App. pp. 18a-31a). Also on September 8, 1998, the District Court issued its Order and Judgment granting summary judgment in Respondents' favor and dismissing Petitioner's action, in its entirety. (Pet. App. pp. 32a-33a).

STATUTORY AND CONSTITUTIONAL PROVISIONS AT ISSUE

1. Petitioner's Complaint alleged that Respondents violated his rights under the Americans with Disabilities Act (hereinafter the "ADA"). 42 U.S.C. § 12101, *et seq*. The following portions of this statute are at issue here:

> A. 42 U.S.C. § 12102(2), which defines "disability" as:
>
> (A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.

B. 42 U.S.C. § 12203, which provides that:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

2. Petitioner included similar claims under the Michigan Handicappers' Civil Rights Act (hereinafter "MHCRA") which mirrors the ADA.[1] The pertinent provisions are:

A. M.C.L. 37.1202(1)(b), which provides:

> An employer shall not:
>
> * * *
>
> (b) discharge or otherwise discriminate against an individual with respect, compensation, or the terms, conditions or privileges of employment, because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position.
>
> * * *

---

1. Effective March 12, 1998, the MHCRA's title was changed to the Persons With Disabilities Civil Rights Act ("PWDCRA"). The substantive provisions at issue in this case were not amended. Because prior opinions cite the MHCRA, Respondents will continue to refer to this statute by that name.

B. M.C.L. 37.1602(a), which states:

> A person or two or more persons shall not do the following:
>
> (a) retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

* * *

COUNTER-STATEMENT OF THE CASE

A. Proceedings Below.

Petitioner's Complaint alleged that Respondents violated his statutory rights granted by the ADA and the MHCRA by discriminating against him because he was "regarded as" being disabled. Petitioner also alleged that Respondents retaliated against him in violation of both statutes. Respondents denied all claims.

Respondents' motion for summary judgment was granted on September 8, 1998, and Petitioner's Complaint was dismissed in its entirety. (Pet. App. pp. 18a-33a). The Sixth Circuit Court of Appeals agreed, and affirmed the dismissal on November 29, 1999. Petitioner's motion for rehearing *en banc* was subsequently denied.

B. Prior Litigation Between These Parties.

This is the fourth lawsuit Richard Sullivan has filed against the River Valley School District and/or Superintendent Williams. The first was filed in July 1993 in Berrien County,

Michigan, Circuit Court under the caption of *Sullivan v. River Valley School District, et al*, No. 93-2066-NZ-T. That case arose as a result of Petitioner's refusal to pay certain mandatory union fees. That complaint was dismissed upon summary disposition (aka summary judgment), which the Michigan Court of Appeals affirmed on July 11, 1997.

Petitioner's application for leave to appeal to the Michigan Supreme Court was denied, but the Michigan Supreme Court remanded the case to the Court of Appeals for reconsideration in light of the Sixth Circuit decision of *Chappel v. Montgomery*, 131 F.3d 564 (6th Cir. 1998). On remand, the Michigan Court of Appeals reached the same conclusion and again affirmed the dismissal of the case. Petitioner's second application for leave to appeal to the Michigan Supreme Court was denied, as was his Petition for a Writ of Certiorari to this Court. *See Sullivan v. River Valley School Dist, et al.*, S. Ct. No. 99-463.

The second lawsuit, entitled *Sullivan v. Williams and Onkka*, No. 96-1652-NO-T, was filed on April 16, 1996 in Berrien County Circuit Court and was also dismissed upon summary disposition. The order of dismissal was entered on April 8, 1997. Petitioner did not appeal the dismissal of his claims against Dr. Williams.

On October 16, 1996, Petitioner filed his third Berrien County lawsuit, entitled *Sullivan v. River Valley School District and Williams*, No. 96-4019-NO-H, asserting claims identical to those raised herein, *i.e.* alleged violations of the Americans With Disabilities Act and the MHCRA. Petitioner voluntarily dismissed that action after Respondents filed a motion to consolidate it with the second Berrien County lawsuit, mentioned above.

In addition to the three prior lawsuits, Petitioner has been the subject of the tenure hearings before the Michigan Tenure Commission. River Valley School District filed tenure charges against Petitioner seeking his discharge for misconduct and insubordination. The State Tenure Commission (STC) ordered that Petitioner serve a three-year, unpaid suspension as discipline for his misconduct. The Michigan Court of Appeals affirmed that decision, and the Michigan Supreme Court refused to hear the case.

C. Statement of Facts.

The Sixth Circuit's opinion provides a very detailed summation of the undisputed facts giving rise to this case. Respondents incorporate that statement of facts by reference so as not to belabor this Court with a full restatement of the facts. Instead, Respondents simply will reiterate their concerns about Petitioner's behavior.

The most concise summary why Respondents became concerned about Petitioner's performance is contained in the tenure charges brought against Petitioner. In a letter to the Board of Education recommending discipline, Dr. Williams described the following events, which occurred over a relatively short period of time in 1995:

1. Richard A. Sullivan exercised poor professional judgment and engaged in misconduct by writing and communicating a letter dated February 7, 1995 to a student of the School District, Danny Nizzi, then Student Congress President, containing his complaint about a decision by the faculty sponsor and inappropriate, contemptuous and cynical remarks.

2. Richard A. Sullivan exercised poor professional judgment and engaged in misconduct, on or about

February 6, 1995, by disclosing confidential student record information about the grade of one of his students, John Spiekhout, in one of his classes during the 1994-95 school year and the grade change hearing with respect to the grade of that student to the newspaper reporter, Lynn Stevens, who subsequently wrote an article that appeared in the Harbor Country News, a newspaper of local circulation in the River Valley School District, which included that information provided by him.

3. Richard A. Sullivan engaged in an act of misconduct and insubordination by his failure to report for a meeting with then Superintendent Charles O. Williams, scheduled for March 6, 1995 at 2:30 p.m., as directed by the Superintendent in his written communication of March 1, 1995.

4. Richard A. Sullivan engaged in an act of misconduct and insubordination by leaving the school building, River Valley High School, without authorization, on March 6, 1995, instead of attending the meeting with then Superintendent Charles O. Williams, scheduled for 2:30 p.m. on that date.

5. Richard A. Sullivan engaged in acts of insubordination and misconduct by his failure to comply with a verbal directive given to him April 27, 1995, a written directive dated May 4, 1995 and another written directive dated May 24, 1995, all given to him by then Superintendent Charles O. Williams, directing him to provide Principal Degner or Principal Zech, with his grade book and lesson plan book.

6. Richard A. Sullivan engaged in acts of insubordination and misconduct by his failure to comply with the directive of the Board of Education adopted May 8, 1995, pursuant to the recommendation of then Superintendent Charles O. Williams, to have a physical and mental examination at the expense of the Board of Education according to Article IX(l)(e) of the collective bargaining agreement between the River Valley School District and the River Valley Education Association 5-CEA/MEA/NEA, and his failure to comply with written directives given to him by then Superintendent Charles O. Williams by letters dated May 23, 1995 and May 31, 1995, to make appointments for a physical exam and a psychological exam by a physician and psychiatrist from a list provided to him and notify the Superintendent's office of the dates and times of the appointments.

7. Richard A. Sullivan engaged in an act of insubordination and misconduct by his failure to comply with a directive given to him by then Superintendent Charles O. Williams, by letter dated June 16, 1995, directing him to make arrangements to meet with Superintendent Williams to investigate and review charges with respect to various incidents enumerated in the written directive to him dated June 16, 1995.

8. Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education January 23, 1995, at which grievances he had filed were being considered, where he engaged in disruptive and abusive verbal outbursts and intimidating physical actions, including the shoving of papers in the faces of certain individual

members of the Board of Education, refusing to comply with directives given to him by the President of the Board of Education, Dennis A. Zeiger, to cease such behavior.

9. Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education on April 24, 1995, where following a hearing regarding his payment of union representation fees, he stated to the President of the Board of Education, Dennis A. Zeiger, "You'll be sorry for this" and he stated to another member of the Board of Education, Greg Scygiel, standing with the then President of the River Valley Education Association, William Magley, "You will regret this."

10. Richard A. Sullivan engaged in an act of insubordination and misconduct by refusing to sign his evaluation and individualized development plan provided to him by Principal Degner and Principal Zech on March 24, 1995.

(Respondents' Appendix (hereinafter "Res. App.") pp. 1a-6a).

Due to this curious behavior, Dr. Williams sought input from a disinterested psychologist to determine whether Petitioner required any manner of professional assistance. Contrary to Petitioner's statement that Dr. Williams suggested Petitioner was unstable, Dr. Williams merely sent a packet of information to psychologist Timothy Onkka, so he could analyze the situation. Dr. Onkka did not diagnose any particular problem, disability, or condition, but simply gave his impression that Petitioner should undergo a more formal evaluation. Respondents had no preconceived notion, one way or the other, whether Petitioner needed professional help. All they knew was

that Petitioner's behavior had changed and was negatively affecting his teaching performance. As allowed by the collective bargaining agreement, Petitioner was instructed to undergo physical and psychological examinations, but he refused. Petitioner's conduct was considered a flagrant act of insubordination, which contributed to the proposed discipline.

SUMMARY OF THE ARGUMENT

Petitioner has failed to identify any compelling reason justifying a writ of certiorari to the Sixth Circuit. Petitioner did not identify any conflicting circuit court decisions, or a circuit decision which conflicts with that of a state court of last resort. Similarly, Petitioner has not identified any important federal questions resolved by a state court which conflict with any other state court of last resort or a United States Court of Appeal. Accordingly, Petitioner has failed to identify *any* reason why this Court's discretion should be exercised by granting the petition for a writ of certiorari.

Petitioner has also failed to call into question the Sixth Circuit's rationale in affirming summary judgment issued by the United States District Court for the Western District of Michigan. Petitioner failed to make a prima facie case of discrimination or retaliation, under both state and federal law. The Sixth Circuit clearly articulated why dismissal was appropriate when it affirmed the district court's judgment. Because Petitioner failed to demonstrate that Respondents regarded him as having a disability which substantially limited a major life activity, Petitioner failed to make a prima facie case. Petitioner also failed to rebut the legitimate, nondiscriminatory reasons for Respondents' actions. Consequently, the discrimination claims fail. Moreover, Petitioner's suggestion that the Sixth Circuit decision conflicts with *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180

(3d Cir. 1999), is without merit. The decisions are actually harmonious in light of the particular facts presented in each of them. The rules of law are identical and the courts applied them to the facts with which they were presented.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO IDENTIFY A COMPELLING REASON REQUIRING THIS COURT TO EXERCISE ITS DISCRETION BY ISSUING A WRIT OF CERTIORARI.

A. General Considerations Governing Petitions for a Writ of Certiorari.

United States Supreme Court Rule (S. Ct. R.) 10 identifies the criteria justifying a writ of certiorari and begins by explaining that this issue is left to the sound discretion of the court. Only compelling reasons will justify issuance of a writ of certiorari, such as when:

> (a) a United States Court of Appeals has entered the decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States Court of Appeals;

> (c) a state court of a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

This same rule goes on to explain that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." However, that is all Petitioner does here.

Petitioner did not specifically identify the subpart of S. Ct. R. 10 which he believes justifies review on certiorari. Petitioner's brief is devoted almost exclusively to the argument that the lower courts either made erroneous factual findings or misapplied properly stated controlling rules of law to the facts of the case. The second of Petitioner's two questions presented for review suggests that the Sixth Circuit's opinion was inconsistent with the Third Circuit's decision of *Taylor v. Pathmark Stores, Inc.*, *supra*, but, as explained in the section which follows, he failed to articulate any substantive difference in rulings between these circuits' rulings.

Moreover, the facts of this case are sufficiently unique that any possible precedential value is extremely remote. The issue presented by Petitioner concerns only himself and has no significance beyond its impact on the immediate parties.

B. There is no Inconsistency Between the Sixth Circuit's Ruling Below and the Third Circuit's Decision of *Taylor v. Pathmark Stores, Inc.*

Despite its prominence in Petitioner's statement of questions presented for review, he devotes barely one page of

his Petition to a discussion of the purported inconsistency between the Sixth Circuit's decision below and *Taylor v. Pathmark Stores, Inc.*, *supra*. Petitioner acknowledges that the Sixth Circuit was aware of, and relied upon, *Taylor v. Pathmark Stores, Inc.* but does not identify how the rule of law articulated by the Sixth Circuit purportedly differs from that espoused in *Taylor*. Instead, Petitioner simply argues that the correct rule of law was misapplied to the facts of this particular case. As stated above, however, that is insufficient to warrant a writ of certiorari.

The *Taylor* decision, while serving as a legal springboard for the Sixth Circuit's decision in this case, is factually distinguishable from the present dispute. In *Taylor*, the employer mistakenly believed that the employee was substantially limited in the major life activity of working and, therefore, was disabled. Based on this mistaken belief, Pathmark Stores terminated Taylor's employment. The employee, however, argued that he was capable of performing the job, which is why the Third Circuit concluded that a jury had to determine whether the mistaken belief was reasonable in light of what had transpired.

Conversely, Respondents here have repeatedly explained that they did not know whether Petitioner was capable of performing the duties of his job. River Valley Schools had no preconceived notion, one way or the other, whether Petitioner had a condition which substantially limited the major life activity of working. All they knew is that Petitioner's behavior was hampering his effectiveness. As a matter of law, Respondents did not "regard" Petitioner to be disabled. The factual dispute requiring jury resolution in *Taylor* is entirely absent here.

As the Sixth Circuit explained below, Petitioner argued that the Respondents attempted to fabricate the perception of a disability to support some manner of discipline. However, the Sixth Circuit also recognized that the ADA is *only* designed to

redress discriminatory employment decisions, not employers' actions based on knowingly false accusations of a disability. Respondents do not concede they did such, but Petitioner's bare assertions take his claims outside the realm of the ADA. Even the *Taylor* court noted that:

> [i]f the contention were that Pathmark used Taylor's disability as a pretext for ridding itself of an employee with seniority under the union collective bargaining agreement, Taylor would not have a successful claim that he was regarded as disabled. The ADA prohibits discrimination, not action taken using discrimination as a pretext.

Taylor v. Pathmark Stores, Inc., 177 F.3d at 195, n.10 (3d Cir. 1999). Consequently, to the extent *Taylor* even applies to this particular case, it supports Respondents' position and is entirely harmonious with the Sixth Circuit's decision below.

It must be remembered that Respondent River Valley School District's adverse employment action was as a result of a multitude of events. Discipline did not follow a single event involving, or action taken by, Petitioner, but it was based in substantial part on Petitioner's failure to comply with a directive to undergo certain evaluations. "If the employer is factually mistaken about the extent of an employee's impairment, and the employee or his agent is responsible for the mistake, the employer is not liable under the ADA." *Taylor*, *supra*, at 193. Here, if Respondent did have a mistaken understanding about Petitioner's ability to perform the duties of his job, it resulted directly and exclusively from Petitioner's refusal to undergo the ordered evaluations. Consequently, Respondents cannot be liable under the ADA.

C. Petitioner Failed to Describe any Inconsistency Between the Sixth Circuit's Decisions and any Other Reported Cases.

Petitioner contends the lower court's reliance on *Cody v. SIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595 (8th Cir. 1998) and *Yin v. State of California*, 95 F.3d 864 (9th Cir. 1966), *cert den.*, 117 S. Ct. 955 (1997) were misplaced. However, it is Petitioner who is misplaced in making this argument. In *Cody*, the Eighth Circuit restated the rule that general awareness of behavior that one might associate with an impairment does not necessarily mean that how the employee was treated was because he was perceived to be disabled. Similarly, if there are health problems which significantly affect an employee's performance of essential job functions, ordering a physical examination is justified. The Sixth Circuit did not misconstrue or misapply the general, well-accepted rules of law set forth in those cases. Instead, Petitioner is simply arguing that his particular factual situation is different than those presented in those cases. However, that is not a sufficient reason for granting a writ of certiorari. Similarly, Petitioner's suggestion that the EEOC guidelines were not followed is another example of a situation undeserving of Supreme Court review.

As detailed above, the Sixth Circuit's decision herein is harmonious with those of other Circuit Courts of Appeal, including the Third and Eighth Circuits. The decision properly applied established rules of law to the facts of this case, so certiorari is unwarranted.

II. THE SIXTH CIRCUIT CORRECTLY CONCLUDED THAT PETITIONER FAILED TO STATE A PRIMA FACIE CASE OF DISCRIMINATION OR RETALIATION AND COULD NOT DEMONSTRATE THAT RESPONDENTS' LEGITIMATE, NONDISCRIMINATORY ACTIONS WERE PRETEXTUAL.

The remainder of the petition for a writ of certiorari contains nothing more than general argument suggesting that established law was not properly applied to the facts of this particular case. Petitioner contends simply that the lower courts reached the wrong conclusions. That, however, is not a proper basis on which to issue a writ of certiorari. Rather than ignoring Petitioner's argument on the merits of this case, Respondents will briefly analyze the pertinent civil rights statutes and explain why the lower courts reached the correct conclusions.

A. General Rules Under the ADA.

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). This means that:

> A person seeking relief under the ADA for termination must establish (1) that [he] is a disabled person within the meaning of the Act, (2) that [he] is qualified to perform the essential functions of [his] job with or without reasonable accommodation, and (3) that [he] suffered an adverse employment decision because of [his] disability.

McKay v. Toyota Motor Co., 110 F.3d 369, 371 (6th Cir. 1997); *citing Monette v. Electronic Data System Co.*, 90 F.3d 1173, 1179 (6th Cir. 1996). Every ADA plaintiff is required to present evidence, either direct or circumstantial, of discrimination. In

cases in which a plaintiff relies upon circumstantial evidence of discrimination, a modified *McDonnell Douglas*[2] burden shifting analysis is utilized. The federal circuits routinely apply this burden shifting framework to ADA claims. *See e.g., Monette v. Electronic Data Systems Corp., supra*; *Price v. S-B Power Tool*, 75 F.3d 362 (8th Cir. 1996); *Daigle v. Liberty Life Ins., Co.*, 70 F.3d 394 (5th Cir. 1995); *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793 (7th Cir. 1995); *Ennis v. National Ass'n of Business & Educ. Radio Inc.*, 53 F.3d 55 (4th Cir. 1995).

B. Petitioner Presented No Evidence that Respondents Perceived Him to be Disabled, as Defined Under the ADA.

Petitioner's first obligation is to present evidence sufficient to state a prima facie case of discrimination. Petitioner must establish the existence of a disability that substantially limits a major life activity. *Monette, supra*, at 1181; *citing Prewitt v. United States Postal Serv.*, 662 F.2d 292, 306-308 (5th Cir. 1981) and *Pushkin v. Regents of the Univ of Colorado*, 658 F.2d 1372 (10th Cir. 1981). The ADA defines a disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Petitioner denies that he has any psychological disorder. In other words, he does not contend

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2. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1980).

that he is "disabled," in the usual sense. Instead, Petitioner's claim is based solely on the belief that Respondents "regarded" him as having some type of impairment and then discriminated against him because of that alleged perception. 42 U.S.C. § 12102(2)(C).

"[A]n employer becomes subject to this prong of the statute only when it inaccurately 'perceives' as disabled, an employee who is *not* substantially impaired, and thereafter negatively stereotypes that employee's abilities to the latter's detriment." (Emphasis in original). *McCollough v. Atlanta Beverage Co.*, 929 F. Supp. 1489, 1498 (N.D. Ga., 1996). This particular provision is designed to protect against erroneous stereotypes that some employers hold regarding certain physical or mental impairments that are not substantially limiting in fact. *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1448-1449 (W.D. Wis. 1996); *quoting Vande Zande v. Wisconsin Dep't of Administration*, 44 F.3d 538, 541 (7th Cir. 1995).

In *Byrne v. Board of Educ*, 979 F.2d 560 (7th Cir. 1992), the court explained that "courts have uniformly held 'that an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job.' " *Byrne*, at 567; *quoting Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986). The "regarded as" element of the ADA is the Congressional acknowledgment that "society's accumulated myths and fears about disability and disease are as handicapping as other physical limitations that flow from such impairment." *Schluter*, *supra*, at 1449; *quoting School Bd of Nassau Co., Florida v. Arline*, 480 U.S. 273, 284, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).

The ADA's focus in this area "is whether the impairment, as *perceived*, would affect the individual's ability to find work

across the spectrum of same or similar jobs." (Emphasis in original). *EEOC v. Chrysler Corp*, 917 F. Supp. 1164, 1168 (E.D. Mich. 1996); citing *Partlow v. Runyon*, 826 F. Supp. 40, 44 (D.N.H. 1993). For Petitioner to make a prima facie showing that Respondents "regarded" him as being disabled, "the employer must perceive an impairment, and the employer must perceive that the impairment substantially limits a major life activity." *Fenton v. Pritchard Corp*, 926 F. Supp. 1437, 1444 (D. Conn. 1996). Simply being aware of an impairment is insufficient to demonstrate that the employer regarded the employee as disabled or contributed to the adverse employment action. *Kelly v. Drexel Univ*, 94 F.3d 102, 109 (3d Cir. 1996); *see also Taylor v. Principal Financial Group, Inc.*, 93 F.2d 155, 164 (5th Cir. 1996). "In order to establish a disability under the 'regarded as' provision, petitioner must show that the perceived impairment is a substantial limitation in a major life activity." *Schluter, supra*, at 1449; *quoting Howard v. Navistar Int'l*, 904 F. Supp. 922, 930 (E.D. Wis. 1995). As part of Petitioner's prima facie case, he must demonstrate that Respondents ". . . regarded him as having an impairment that substantially limited his major life activity of working." *Id.* This, however, he did not do.

The federal regulations promulgated under the ADA provide guidance on what constitutes a substantial limitation of a major life activity.

> "Substantially limits" means a person cannot perform a "major life activity" or is significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same activity.

29 C.F.R. § 1630.2(j)(1)(ii). "Major life activities" include:

> . . . functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 C.F.R. § 1630.2(i).

In order to show that one is substantially limited in the major life activity of working, a plaintiff must prove that he is:

> Significantly restricted in ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i).

To be impaired in the major life activity of working, the Petitioner must be significantly restricted or perceived as such, in the ability to perform a class of jobs or a broad range of jobs in various classes. *McKay, supra*, at p. 373. "An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *McKay, supra; citing Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995); *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994), *cert den.*, 115 S. Ct. 1095 (1995); *Jasney v. United States Postal Serv, supra*, at 1249 n.3. "The inability to work at the particular job of one's choice is not a substantial limit on working under the [ADA]." *Schluter*, at 1449; *quoting Bern v. Board of Educ.*, 979 F.2d 560, 567 (7th Cir. 1992); and *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986). "The burden is on the plaintiff to establish the existence of an

impairment that substantially limits a major life activity as an element of the plaintiff's prima facie case." *Jasney v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985)[3]. "In order to establish a disability under the 'regarded as' provision, plaintiff must show that the perceived impairment is a substantial limitation on the major life activity." *Schluter*, at 1449; *citing Howard v. Navistar. Int'l*, 904 F. Supp. at 930.

Petitioner argues that Respondents did not give him an opportunity to determine whether particular Board action concerned him. He also argued that Respondents did not establish that he posed any particular risk, for purposes of being evaluated or disciplined. This, however, is not an argument that the lower courts misapplied controlling law. Instead, Petitioner is merely arguing that the controlling law was misapplied to the facts of this case. As previously stated, that does not serve to justify a writ of certiorari. Because Petitioner failed to make a prima facie case, certiorari is unnecessary.

C. Petitioner's Acts of Misconduct were Legitimate, Nondiscriminatory Reasons for Respondents' Employment Decision and, Because Petitioner Failed to Show Those Reasons were Pretextual, Dismissal of His Complaint was Appropriate.

Even if Petitioner could state a prima facie ADA claim, dismissal of his Complaint was still appropriate. Under the *McDonnell Douglas* burden shifting analysis if a plaintiff makes a prima facie case, the burden shifts to the employer to offer a legitimate, nondiscriminatory justification for its action. *Monette, supra*, at 1179. To prevail on his ADA claim, Petitioner

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3. Because the ADA parallels the Rehabilitation Act, courts often apply the rationale from Rehabilitation Act decisions to ADA cases. *See Monette, supra*, p. 1178.

must not only demonstrate a disability and that he was qualified for the job, but he must also show that the adverse employment decision ". . . was made solely because of his disability." *Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996).

1. *Respondents Articulated Legitimate, Non-Discriminatory Reasons for Their Decision.*

As the undisputed evidence makes clear, there were many reasons why Petitioner was required to undergo an evaluation, and many reasons why tenure charges were filed against him. One of the most significant reasons for the charges was Petitioner's refusal to be examined. Respondents' request had nothing to do with any perception they had of Petitioner's physical or mental condition. The proper focus of a "regarded as" ADA claim "is on the impairment's effect on the attitudes of others." *Soileau v. Gilford of Maine*, 928 F. Supp. 37, 51 (D. ME. 1996); *citing Wooten v. Farmland Foods*, *supra*, at 385, and *Bern*, *supra*, at 567. Absolutely nothing has been offered by Petitioner even intimating that Petitioner's behavior affected Dr. Williams' attitude or had any impact on the attitudes of others.

The evidence clearly reflects the existence of legitimate, nondiscriminatory reasons for the employment action taken against Petitioner. The facts also show that Petitioner's discipline had nothing to do with any preconceived notions about his physical or mental condition, but had everything to do with his poor judgment, misconduct and insubordination. The factual basis behind the charges were sufficient to warrant a three-year unpaid suspension. The legitimate reasons are indisputable.

2. *Petitioner Failed to Show Respondents' Reasons were Pretextual.*

Having articulated legitimate, nondiscriminatory reasons for their actions, the burden returns to Petitioner to show that Respondents' proffered reasons were a mere pretext for intentional discrimination. At all times, Petitioner carries the ultimate burden of proving, by a preponderance of the evidence, that the challenged employment decision was motivated by the presence of a disability. *Burdine*, at 253. Having articulated legitimate, nondiscriminatory reasons for their actions, Respondents are *entitled* to summary judgment unless Petitioner could show that the reasons were pretextual.

"An employee can show pretext by offering evidence that the employer's proffered reason had no basis in fact, did not actually motivate its decision, or was never used in the past to discharge an employee." *Smith v. Chrysler Corp*, 155 F.3d 799, 805-806 (6th Cir. 1998); *citing Kocsis v. Multi-Care Management Inc.*, 97 F.3d 876, 883 (6th Cir. 1996). "In challenging an employer's action, an employee 'must demonstrate that the employer's reasons (*each of them*, if the reasons independently caused [the] employer to take the action it did) are not true.' " *Smith, supra*, at 806; *quoting Kariotis v. Navastar Int'l Transportation Corp.*, 131 F.3d 672, 676 (7th Cir. 1997). Nowhere did Petitioner even argue, let alone establish, that Respondents' reasons were pretextual.

Moreover, the Sixth Circuit has recognized that when proper, nondiscriminatory reasons for the employment action are honestly held and reasonably based on particularized facts, the employer's actions are almost presumptively legitimate and non-pretextual. *See Smith, supra*, at pp. 806-807. The facts identified above reveal that there were many rational reasons for Respondents to require an evaluation of Petitioner and to

discipline him when he refused. The courts are not designed to micro-manage or second guess the sound business judgment decisions of an employer. Even if a court might have done something different if faced with the same situation, that does not mean discrimination occurred and does not establish pretext. Petitioner must come forward with actual evidence demonstrating that the reasons are pretextual, rather than mere speculation, conjecture, or guess-work. *See Smith*, *supra*, at p. 806. As Petitioner has not established that Respondents' reasons were pretextual, the Sixth Circuit's affirmance of the District Court's dismissal on summary judgment was appropriate and should be affirmed.

D. Petitioner Failed to Make Out a Prima Facie Case Regarding his Retaliation Claims.

Retaliation claims under the ADA must meet specific requirements of proof. The ADA provides that "no person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." (42 U.S.C. § 12203(a)).

> To establish a prima facie case of retaliation, a plaintiff must show: (1) that he engaged in protected activity; (2) that he suffered adverse employment action; and (3) that a causal connection existed between the protected activity and the adverse action. If the plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to establish a legitimate, nondiscriminatory reason for the adverse employment action. The plaintiff, of course, bears the ultimate burden of proving that the proper reason for the action was merely a pretext for discrimination.

Penny v. United Parcel Serv, 128 F.3d 408, 417 (6th Cir. 1997); *citing Canitia v. Yellow Freight Systems Inc.*, 903 F.2d 1064, 1066 (6th Cir.), *cert den.*, 498 U.S. 984 (1990).

The absence of a prima facie claim of retaliation is so glaring that it might actually be overlooked. Petitioner has merely described acts which he believes were retaliatory. Stunningly, Petitioner failed to identify any "protected activity" for which Respondents allegedly retaliated. The case law on this issue is clear. Petitioner must first show that he was engaged in a protected activity. Instead of doing this, he simply alleges that he was a good teacher, that he should have been evaluated differently and that he was not given an opportunity to respond to some of the items in his evaluation. Before Petitioner may rely on events as retaliatory, Petitioner must first have been engaged in a protected activity. Because Petitioner's entire brief is silent on what that protected activity was, the retaliation claim was properly dismissed.

Additionally, Petitioner must establish a causal connection between the protected activity and the adverse action. Again, an analysis of this component is completely missing in Petitioner's Brief on Appeal. The obvious reason for its omission is that it cannot be shown. Petitioner has failed to offer any evidence indicating that Respondents' acts were caused by Petitioner's purportedly protected activities. Petitioner's failure to make a prima facie case of retaliation alone justifies affirming the lower court's dismissal of this count.

Although it is unnecessary for this Court to review this point, unless it concludes a prima facie case was made, Respondents have articulated legitimate, nondiscriminatory reasons for their actions. Those are set forth in detail in the Statement of Facts and Argument sections above. Having articulated legitimate, nondiscriminatory reasons for their act,

Petitioner was expected to show that the proffered reasons were a pretext for retaliation, which he failed to do.

The last argument Petitioner makes in support of his petition for a writ of certiorari is that the lower court's reliance on *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996) was misplaced. What makes this curious is that nowhere in the Sixth Circuit decision is the *Roush* case cited, let alone discussed or relied upon. Petitioner's suggestion that the lower court erred in following this case, or that anything in the case deserves establishing disability perception precedent, is plainly unwarranted. The lower court's decision concerning the retaliation counts should stand.

CONCLUSION

Petitioner has failed to present any cogent reason why any issue in this case is worthy of this Court's review. The Sixth Circuit Court of Appeals' Decision is sound, harmonious with decisions of other circuits and states, and correctly applies controlling law to the undisputed facts of this case. Respondents respectfully request that Richard Sullivan's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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THRUN, MAATSCH AND NORDBERG, P.C.
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APPENDIX

APPENDIX — LETTER FROM RIVER VALLEY SCHOOL DISTRICT TO DAVID L. PONEGALEK, JR. DATED JULY 20, 1995

July 20, 1995

Mr. David L. Ponegalek, Jr.
Secretary, Board of Education
River Valley School District
15480 Three Oaks Road
Three Oaks, MI 49128

Re: Richard A. Sullivan
Charges Pursuant to Article IV, Section 2, of the Michigan Teacher Tenure Act, MCL 38.102
Proposal and Recommendation for Discharge

Dear Mr. Ponegalek:

We, the undersigned Charging Parties, are submitting this communication pursuant to Article IV, Section 2, of the Michigan Teacher Tenure Act, MCL 38.102, to file charges against Richard A. Sullivan, a tenured classroom teacher, currently employed with the River Valley School District. We are proposing and recommending that Richard A. Sullivan be discharged from his employment with the River Valley School District as the proposed outcome and disposition of this matter, because of his misconduct and acts of insubordination during the 1994-95 school year, as hereinafter specified.

Appendix

We, the undersigned Charging Parties, hereby bring and specify the charges against Richard A. Sullivan as follows:

1. Richard A. Sullivan exercised poor professional judgment and engaged in misconduct by writing and communicating a letter dated February 7, 1995 to a student of the School District, Danny Nizzi, then Student Congress President, containing his complaint about a decision by the faculty sponsor and inappropriate, contemptuous and cynical remarks.

2. Richard A. Sullivan exercised poor professional judgment and engaged in misconduct, on or about February 6, 1995, by disclosing confidential student record information about the grade of one of his students, John Spiekhout, in one of his classes during the 1994-95 school year and the grade change hearing with respect to the grade of that student to the newspaper reporter, Lynn Stevens, who subsequently wrote an article that appeared in the Harbor Country News, a newspaper of local circulation in the River Valley School District, which included that information provided by him.

3. Richard A. Sullivan engaged in an act of misconduct and insubordination by his failure to report for a meeting with then Superintendent Charles O. Williams, scheduled for March 6, 1995 at 2:30 p.m., as directed by the Superintendent in his written communication of March 1, 1995.

Appendix

4. Richard A. Sullivan engaged in an act of misconduct and insubordination by leaving the school building, River Valley High School, without authorization, on March 6, 1995, instead of attending the meeting with then Superintendent Charles O. Williams, scheduled for 2:30 p.m. on that date.

5. Richard A. Sullivan engaged in acts of insubordination and misconduct by his failure to comply with a verbal directive given to him April 27, 1995, a written directive dated May 4, 1995 and another written directive dated May 24, 1995, all given to him by then Superintendent Charles O. Williams, directing him to provide Principal Degner or Principal Zech, with his grade book and lesson plan book.

6. Richard A. Sullivan engaged in acts of insubordination and misconduct by his failure to comply with the directive of the Board of Education adopted May 8, 1995, pursuant to the recommendation of then Superintendent Charles O. Williams, to have a physical and mental examination at the expense of the Board of Education according to Article IX(1)(e) of the collective bargaining agreement between the River Valley School District and the River Valley Education Association 5-CEA/MEA/NEA, and his failure to comply with written directives given to him by then Superintendent Charles O. Williams by letters dated May 23, 1995 and May 31, 1995, to make appointments for a physical exam and a psychological exam by a

physician and psychiatrist from a list provided to him and notify the Superintendent's office of the dates and times of the appointments.

7. Richard A. Sullivan engaged in an act of insubordination and misconduct by his failure to comply with a directive given to him by then Superintendent Charles O. Williams, by letter dated June 16, 1995, directing him to make arrangements to meet with Superintendent Williams to investigate and review charges with respect to various incidents enumerated in the written directive to him dated June 16, 1995.

8. Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education January 23, 1995 at which grievances he had filed were being considered, where he engaged in disruptive and abusive verbal outbursts and intimidating physical actions, including the shoving of papers in the faces of certain individual members of the Board of Education, refusing to comply with directives given to him by the President of the Board of Education, Dennis A. Zeiger, to cease such behavior.

9. Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education April 24, 1995, where following a hearing regarding his payment of union representation fees, he stated to the President of the Board of Education, Dennis A. Zeiger, "You'll be

sorry for this" and he stated to another member of the Board of Education, Greg Scygiel, standing with the then President of the River Valley Education Association, William Magley, "You will regret this."

10. Richard A. Sullivan engaged in an act of insubordination and misconduct by refusing to sign his evaluation and individualized development plan provided to him by Principal Degner and Principal Zech on March 24, 1995.

Richard A. Sullivan by the actions and conduct as specified in the above charges, has demonstrated that he is not fit for continued employment with the River Valley School District and that he must be discharged as recommended and proposed. His actions and conduct demonstrate a lack of responsible judgement and constitute a breach and violation of the responsibilities of his employment. His actions and conduct have adversely affected the operation and administration of the School District and the administrators, teachers, students and parents involved in these circumstances, which justifies his discharge from employment with the School District.

Wherefore, we, the undersigned Charging Parties, ask, recommend and propose that the Board of Education take the necessary action to proceed upon the charges as filed and effect the proposed outcome of the discharge of Richard A. Sullivan from his employment with the River Valley School District.

Sincerely,

RIVER VALLEY SCHOOL DISTRICT

/s/
Donald D. Larson
Superintendent
Dated: July 19, 1995

/s/
Charles O. Williams
Former Superintendent
Dated: July 19, 1995

/s/
Gustave A. Damaske
Business Manager
Dated: July 19, 1995

DDL/COW/gev

cc: Board of Education Members
C. Mostosky, Union Rep.
R. Jelinek, RVEA President
G. Johnson, Attorney
R. Yingst, Attorney